No. 200,719-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

SANDRA L. FERGUSON
An Attorney at Law

Bar Number 27472

OPENING BRIEF OF RESPONDENT FERGUSON

Attorney for Respondent Ferguson

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This attorney disciplinary proceeding is about what happened when an attorney tried to help family members and in doing so she practiced in areas of the law to which she was a stranger. Ultimately, this case turns on a miserably drafted proposed order which was intended for use after a hearing had been held but which was then spontaneously converted into a TRO when the court determined that one could issue without notice to the opposing party.

Respondent Sandra Ferguson[1] wanted to help her brother and sister-in-law, the "Fergusons", save their house from imminent foreclosure. The house had been rented to Douglas and Lynda Bransford, the "Bransfords", as part of a business deal. Respondent, who had no experience in such matters, took over the case from another attorney, researched the issues and concluded that one possible remedy was a restraining order which sought as part of its relief removal of the Bransfords from the house by way of a writ of restitution.

She prepared a motion asking for relief. In her declaration in support of the motion she specifically stated that she had not provided notice to the other side. When she went to the courthouse to file the papers and get a hearing date (her plan was to then serve the opposing lawyer with

the motion and the hearing date) she was told the judge could consider it immediately. Being aware that CR 65(b) allowed a judge to hear a TRO motion ex parte without notice to the other side, she presented her motion and asked for a ruling. The judge, after reviewing the documents and being aware the other side did not have notice, signed a badly drafted proposed order which had been drafted with a different process in mind.

The obtaining of the order and the circumstances surrounding it lead to these disciplinary proceedings. The hearing officer found a violation of the RPCs and recommended a 30-day suspension. The Disciplinary Board modified the Hearing Officer's Findings and recommends a 90-day suspension. Respondent seeks review by this court.

ASSIGNMENTS OF ERROR

1. The Board erred when it adopted the Hearing Officer's Findings of Fact when some of those fact findings where not based on substantial evidence.
2. The Board erred when it adopted the Hearing Officer's Conclusions of Law when the conclusions of law were in error as to the law.

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[1] In order to avoid confusion with her brother and sister-in-law, Sandra Ferguson will be referred to as "S. Ferguson" or "Respondent").

3. The Board and the hearing officer erred when they found violations of the RPCs.
4. The Board and the hearing officer erred in their findings regarding aggravators and mitigators.
5. The Board and the hearing officer erred when they used the ABA Sanctions Standards when the correct recommendation is for dismissal of the proceedings.
6. The Board and hearing officer erred when they recommended a reprimand and a suspension as sanctions.
7. If a sanction of suspension is to be imposed, the Board erred when it recommended increasing the 30-day suspension to 90-days.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Based on the Assignments of Error, Respondent challenges various findings of fact, conclusions of law and the recommendations.

Respondent contests the following Findings of Fact based on Assignment of Error 1:

- ¶ 6 (in regard to the finding that Respondent had an opinion that the Fergusons' legal and financial position would be significantly enhanced if the Fergusons came into possession before the bankruptcy was filed);

- ¶ 19 (in regard to the finding about Respondent's statement about not having time to provide notice was false);
- ¶ 20 (in regard to finding the Respondent was aware that Judge Rickert did not review all the pleadings);
- ¶ 21 (in regard to it being a false statement that the Bransfords had no proof of mailing or payment at the March 30, 2005, hearing; in regard to it being a false statement that the Bransfords had falsely stated they had posted payments for February and March; in regard to it being misleading in making a statement that a vagrant or indigent person had moved into the house; and in regard to it being a misrepresentation that the Bransfords had not complied with the Court's order requiring payment of the February and March mortgage payments);
- ¶ 22 (in regard to whether the statements set forth in Paragraph 21 were misrepresentations);
- ¶ 25 (in regard to what her legal research showed and her having failed to make the showing required by CR 65(b));
- ¶ 26 (in regards to conscious and knowing violations of statute, court rule and professional obligations); and
- ¶ 27 (in regards to harm caused to the Bransfords).

Respondent contests the Conclusions of Law at Counts 1, 2 and 3 (Assignments of Error 2 and 3).

Respondent contests the determination of the Presumptive Sanctions. (Assignments of Error 4, 5, 6 and 7).

Respondent contests the recommendation of a reprimand and suspension. (Assignments of Error 4, 5, 6 and 7).

STATEMENT OF THE CASE

Sandra Ferguson is a Seattle attorney admitted to the practice of law in 1997. While she has substantial experience in the practice of law she has none in the area of restraining orders or other temporary relief. Hearing Officer's Amended Findings of Fact, Conclusions of Law and Recommendation, ¶ 1 at BF 58, hereafter "AFFCLR"; TR 499. This case comes about because she agreed to help her brother and sister-in law, the Fergusons, in a badly crafted business deal with another couple, the Bransfords.

The Fergusons and the Bransfords both had agreed that the Fergusons would buy the Bransfords' Port Angeles restaurant. As part of the down payment the Fergusons agreed to sell to the Bransfords a Port Angeles home owned by the Fergusons. The equity in the house was part of the payment for the restaurant but the Bransfords were required by the agreement to obtain financing for the balance of the mortgage owed so the Fergusons could payoff their mortgage on the home. This would then allow the Fergusons to obtain new financing so they could make payments on the restaurant loan as well as make improvements to the restaurant. The Bransfords were allowed to move into the residence while they sought financing with the understanding that in the interim they would make the

Fergusons' mortgage payments. TR 414. The original agreements were in 2003 but as the result of various extensions and sub-agreements the contracts were extended into March 2004, AFFCLR ¶ 2, but by the end of 2004 the parties were in substantial dispute over the agreements with each party contending that the other was in default. AFFCLR ¶ 13.

The Bransfords filed a lawsuit to have the restaurant agreement voided and to have title to the house, which remained in the name of the Fergusons, delivered to them. The Fergusons filed their own lawsuit and sought a Writ of Restitution seeking to have possession of the house returned to them. The Bransfords were behind on the mortgage payments.

A show cause hearing on the Writ of Restitution was held March 18, 2005, before Skagit County Judge Michael Rickert. The Fergusons were represented by attorney Stephen Schutt ("Schutt") and the Bransfords were represented by attorney Douglas Owens ("Owens"). Judge Rickert did not issue the writ but rather directed that a trial be held on an expedited basis. As part of his order, he required the Bransfords to bring the mortgage payments up to date within 10-days. AFFCLR ¶ 4.

The expedited trial was set for March 30, 2005. At the hearing no testimony was taken but the question of the Bransfords having not brought the payments current was raised. Owens represented to the court that the

Bransfords had recently mailed the payments and offered to have Lynda Bransford testify to the effect that she had done so. She did not testify. At the end of the hearing the court denied the writ of restitution and ordered the two cases consolidated for trial on both parties' claims. He ordered the Bransfords to continue to make the mortgage payments. AFFCLR ¶ 5.

On April 4, 2005, the Fergusons received notice from the mortgage company that as of April 1, 2005, no payments had been made since January 2005. Since the mortgage company said it had not received payments since January 2005 this meant to the Fergusons that the Bransfords could not have made the February and March payments as had been represented to the court and, therefore, the Bransfords were in defiance of the court's order that the mortgage be kept current.

It was at this point that the Respondent substituted in as attorney for the Fergusons. AFFCLR ¶ 7. S. Ferguson understood that contrary to the representations to the court the mortgage payments had not been made. TR 539. The Fergusons had also received a notice advising that unless payments were brought current foreclosure proceeding would be initiated. EX E to EX 37. At the time the Fergusons were paying rent and living in another house. If the Fergusons could obtain repossession of the residence claimed by Bransfords, they could apply their limited resources to paying

the mortgage. They believed that if they were in the house they could convince the mortgage company to work with them. However, they could not make both a rent and mortgage payment so they needed to obtain possession of the house.

Believing that the Bransfords were not making the payments and that a foreclosure action would soon be filed, Respondent determined that the Fergusons should seek injunctive relief. Over several days, concluding on April 8, 2005, she prepared what she characterized as an "Ex Parte Motion for Temporary Injunctive Relief; a Motion for Order of Court in Unlawful Detainer Action; a Motion for Finding of Contempt; and a Motion to Shorten Time for Show Cause Hearing." EX 38. TR 211 – 214. The gravamen of her argument was that the Bransfords had been ordered to keep the mortgage payments current but they were not doing so in defiance of a court order. As a result the property was in danger of a foreclosure action being filed. The only way to avoid this was to work with the mortgage company to get payments made and the only way to do that was to get the Fergusons into the house so they could stop paying rent payments and instead apply those funds to making the mortgage payments.

After preparing her motions, Respondent sought to determine how to present them. It was initially her plan to have her sister-in-law file the

papers, get an advisement from the court clerk as to when the hearing would be and to deliver the various documents to the Owens, the Bransfords' attorney. She did not plan to be involved in any hearing until after Owens had received the motions. Her sister-in-law had problems understanding how to get the hearing date so Respondent determined that she would travel to Skagit County, file the papers herself and get the hearing date. She then planned to have her sister-in-law deliver the papers to Owens. TR 543 – 546. Crucial to these present proceedings is the fact that at the time she went to Skagit County she had no intention of appearing before the judge but rather went solely to file the motions and to get a hearing date.

On April 11, 2005, she drove to the Skagit County Courthouse. She did not think the ex parte proceeding would occur at the time she went to the courthouse. Because of this she had her daughter with her. TR 544, 546. She did, however, before filing the motion have her sister-in-law confirm once more with the mortgage company that payments had not been received. This was confirmed on the morning of the April 11, 2005. She was hoping for a hearing within a day or two. TR 544, 546. She had not prepared an order or writ of restitution. EXs 39 and 40.

To her surprise when she got to the courthouse the clerk told her Judge Rickert was having ex parte proceedings at that time and she could present her motion then if she wanted to. She knew that usually notice would be required to an opposing party but she was also aware the CR 65(b) permitted entry of a TRO without notice as long as other tests had been met. She had met such tests in her motions and declarations. She determined she could go forward and Judge Rickert could determine what relief, if any, he would grant.

Judge Rickert, who had sat on the prior hearings, heard the matter. In her declaration in connection with the motion she stated that she had not provided notice to Owens because of a lack of time. EX 35. During the hearing Judge Rickert asked her directly about notice to the Owens and she told him that notice would be given as soon as possible. He was obviously aware of the notice requirements and there was no chance he thought notice had been given to Owens. TR 380 – 382.

After consideration of the matter, the judge signed a badly drafted Order of Temporary Injunctive Relief and to Show Cause Why Preliminary Injunction Should Not Issue. EX 38. S. Ferguson had submitted the proposed order but as is apparent from its face it was intended for use after a hearing not as a TRO. The judge spontaneously signed the proposed

order as a TRO and from this all the other problems in this case have flowed. He also signed the Order for a Writ of Restitution, EX 40, and a Writ of Restitution was issued by the clerk. EX 39.

After the orders were signed they were served. AFFCLR ¶ 23. On April 19, 2005, the Bransfords sought to vacate the writ of restitution and set a hearing on the issue for May 6, 2005. The Fergusons filed bankruptcy on May 5, 2005, which removed the proceeding to bankruptcy court. AFFCLR ¶ 24. During the course of the bankruptcy proceeding the Bransfords entered into a written agreement in which the Bransfords gave up any claim to the house. AFFCLR 27.

Additional factual statements and citation to the record are made as appropriate later.

PROCEDURAL HISTORY

A Formal Complaint was filed against attorney Sandra L. Ferguson on November 27, 2007, charging three counts of misconduct. The hearing was held September 8, 9 and 10, 2008. The hearing officer filed Amended Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation (the "AFFCLRs") on January 7, 2009. The hearing officer found three counts of misconduct:

> **Count 1.** In appearing ex parte during the pendency of mature and contested proceedings and failing to give notice

> to opposing counsel Respondent knowingly violated the due process requirements applicable to a Motion for Contempt, a Motion for a Writ of Restitution, and relief under CR 60(b) and CR 65(b).
>
> Respondent's assertion that the allowance in CR 65(b) that circumstances can exist where a temporary restraining order may be obtained without notice to the adverse party dispenses with the notice requirements attendant to contempt, procurement of a Writ of Restitution and relief from judgment or order is incorrect. By seeking an order of contempt, a Writ of Restitution and CR 60 remedies ex parte, Respondent knowingly violated former RPC 3.4(c) and 3.5(b) and 8.4(d).
>
> **Count 2.** By misrepresenting the actions and representations of the opposing party to the Court during the course of an ex parte proceeding appearance, Respondent negligently violated former RPC 3.3(f).
>
> **Count 3.** In failing to provide the court with legal authority which requires notice to an adverse party prior to issuance of an Order of Contempt and prior to issuance of a Write (sic) of Restitution Respondent knowingly violated RPC 8.4(c) and 8.4(d).

He found aggravators of failure to acknowledge wrongful nature of her misconduct and substantial experience in the practice of law. He found the mitigator of no prior history of disciplinary proceedings. He found the presumptive sanctions to be a suspension for Counts 1 and 3 and reprimand for Count 2 under Standards 6.13, 6.22 and 6.32. He recommended a 30-day suspension.

Because the hearing officer recommended a suspension the matter came before the Disciplinary Board on automatic review. ELC 11.2 (b). The Disciplinary Board adopted the Hearing Officer's Findings of Fact and Conclusions of Law after modification to two of his findings to remove the hearing officer's speculations as to what the judge would have done had he been given information allegedly withheld from him by S. Ferguson. The Board changed the recommended sanction by a vote of 9-2 to a three-month suspension. Two of the Board members would have recommended a six-month suspension. Decision Papers, BF 77.

DISCUSSION

Discussion of Motion and Proposed Order: This case turns largely upon the motion filed by S. Ferguson, EX 33, and the proposed order she submitted and which was signed by the judge. EX 38. These are discussed here before discussion of the violations found against Respondent.

It was undisputed that S. Ferguson was an experienced civil rights and employment attorney but was a complete novice at motions for emergency relief:

> Q: (by Bulmer) And in 2005, prior to that time before your brother's case had you ever filed a motion for emergency relief?
>
> A: (by S. Ferguson) No.

Q: And had you ever even filed a motion for a restraining order, temporary retraining order?

A: No.

TR 499. This inexperience shows up in her motion and in her proposed order.

In her motion she groups into a single pleading at least two different types of relief requiring two different processes: 1) a motion for temporary or perhaps permanent injunctive relief (part of the problem is that in her inexperience she jumps back and forth between terms); and 2) a request to vacate an order entered in the unlawful detainer action and seeking contempt finding with remedial relief and imposition of costs and attorney fees. The caption to the motion, by itself, shows her inexperience and confusion over the exact process. EX 33. (For ease of discussion the caption has been separated and numbered to identify each of the separate motions listed in the caption). The caption identified the following motions:

1. Plaintiff's Ex Parte Motion for Temporary Injunctive Relief;

2. Motion for Relief from Order of Court in Unlawful Detainer Action under CR 60(b);

3. Motion under § 7.21.030 for Finding of Contempt and Imposition of Remedial Sanctions, including Costs and Attorney's Fee;

4. Motion to Shorten Time for Show Cause Hearing.

As is apparent the problem is that S. Ferguson lumped together several motions into a single pleading. The first motion was identified in the "relief requested" section of the motion as a request for an "ex parte order for hearing on Plaintiff's request for emergency injunctive relief (in the form of a Writ of Restitution) and for Defendants to show cause why said injunctive relied should not be made permanent." [Emphasis added.] She has confused her terms having moved from the temporary injunctive relief in the caption to emergency injunctive relief in the relief requested.

A vacation of the order which allowed the Bransfords to keep possession of the property was sought under CR 60(b). The request for contempt of court was made pursuant to RCW 7.21.010 with remedial relief sought in the form of a writ of restitution and an order to pay arrearages. Finally, costs and attorney fees were sought under RCW 7.21.030(3).

In the argument portion of the motion she first argues at page 7 that the Bransfords are in contempt. She then argues for remedial sanctions of a writ of restitution as part of the remedy for the contempt citing RCW 7.21.030(1) and (2)(d) to the effect that in a contempt proceeding the court can order remedial sanctions.

She then moves on to her argument that the court should grant temporary and permanent injunctive relief. EX 33, page 12. Again showing her lack of experience in these matters. It is important to recall that S. Ferguson's pleading and proposed order were drafted with the idea that she was going to get an ex parte order requiring the Bransfords to appear on the injunctive relief request and a show cause order as to why the motions under CR 60(b) and RCW 7.21 should not be granted. The plan was that the ex parte order would then be provided to Owens and a hearing would be held. It was not her plan to immediately appear and argue before the court.

In her motion she argues the elements she feels are necessary to obtain both temporary (TRO), whether emergency or not, and permanent injunctive relief including making arguments of irreparable harm.

When the judge unexpectedly heard her motion he signed the badly drafted and pressed the proposed order into use. S. Ferguson also ended up using a writ and order regarding restitution that had previously been prepared by the Fergusons' prior attorney. She crossed out the prior attorney's name and inserted her own. EXs 39 and 40.

The proposed order reflects her inexperience, is confusing and is virtually impossible to interpret. It is captioned: "Order of Temporary

Injunctive Relief and to show Cause Why Preliminary Injunction Should Not Issue" Within the same order she reference a motion for temporary injunctive relief and a show cause order for why preliminary injunction should not issue while at the same time appearing to find contempt, vacation of an order under CR 60 and TRO relief in the form of a writ of restitution. However, the show cause intent of the order is shown because the next section of the proposed order provides a place for notice of a hearing and an all capital letters show cause notice regarding the same. The confusing language and format of the order provides that the matter

1. Having come ex parte before the court;
2. For consideration of plaintiffs' motion for temporary injunctive relief and order to show cause; the court
3. Having studied the record;
4. A writ of restitution shall issue;
5. Relief from the Order allowing Defendants continued possession of the property is granted under CR 60(b)(4) and/or CR 60(b)(11); and
6. Remedial Sanctions for Defendants contempt of court is hereby granted in the form of restoring possession of the property to the Plaintiffs, requiring payment by Defendants of all payments in arrears on the mortgage, to be paid to the Court by certified check and reasonable costs and attorney fees are awarded.

The proposed order concluded with a section that provided:

Day, Date and Time is:

Place is:

FAILURE TO APPEAR MAY RESULT IN THE TEMPORARY ORDER BEING ENTERED BY THE COURT WHICH GRANTS THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE.

The all capitals are in the original.

There are two versions of the order in the record. EX 38 and EX A to EX 64. Both of them have the same court clerk file stamp. On EX 38 the Day, Date, Time and Place blanks were not filled in. On EX A as part of EX 64, these same entries show a time and court. Someone, not S. Ferguson, inserted the time and court entries on the order. TR 237 – 240.

This appears to be an attempt to comply with the provisions of CR 65(b) which requires that "[e]very temporary restraining order granted without notice shall be endorsed with the date and hour of issuance" and then shall be filed with the clerk's office. Somebody apparently recognized that the order was now being treated as a TRO and utilized the blanks intended for the show cause order to seek to comply with the requirements of CR 65(b). This entire process was confused and messy.

What conclusion is one to draw from the proposed order? First, of course, it is terribly drafted. It is clearly the work of an inexperienced person. Secondly, however, is that it specifically references that it is an

order for temporary injunctive relief and a show cause order, that it contains a date, time and place block for the return of the show cause and provides a notice in all capitals that unless the other party shows up the temporary orders may become permanent. While badly written the order seeks to provide temporary injunctive relief in the form of a writ of restitution and to direct that a show cause hearing be held on the vacation of the order allowing the Bransfords to continue possession of the property and on the contempt and requested remedial sanctions including restoring possession of the property, payment of arrearages and reasonable costs and expenses.

With the background it is possible to discuss the specifics of CR 65(b) and the specifics of the allegations against Respondent.

Discussion of CR 65(b) and Issues Surrounding It: CR 65(b) provides in part:

> (b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicants attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be

> required.[Other portions of rule not set forth.] [Emphasis added.]

"A temporary restraining order is an order entered without notice, or after informal notice. CR 65(b). It operates for a period not to exceed 14 days unless extended for good cause. CR 65(b). In contrast, a preliminary injunction is an order entered after formal notice to the opposing party. CR 65(a)." *Fisher v. Parkview Properties*, 71 Wn. App. 468, 474, 859 P.2d 77 (1993).

Respondent understood that as long as the irreparable harm and efforts at notice showings were made, CR 65(b) allowed the court to issue a TRO granting relief without notice to the other side. The advisement of what notice efforts had been made could include that **no effort** had been made. No one in this matter says that any representations were made to the court that Owens had notice. She specifically told the court that he had not been notified both in her declaration and orally. Once she did that it was up to the court to make the decision as to whether or not to issue the TRO with the relief requested.

The Bar, and apparently the hearing officer and Board, argue that her showing of harm and notice did not meet the requirements of CR 65(b) yet the judge granted the relief. Are we to presume that Judge Rickert simply signs anything that is put in front of him as an automaton or that he

does not know the law of notice and emergency relief? At the best all that can be said is there is disagreement over whether the requirements were met. A lawyer should not be subject to sanctions for actions about which there are conflicting conclusions as to legality of the action taken, particularly where one of the persons making a decision was a sitting Superior Court Judge.

CR 65(b) permits obtaining an ex parte TRO without notice to the opposing party. As discussed herein, when S. Ferguson, was, to her surprise, told she could go in immediately on the ex parte calendar, she had to determine whether CR 65(b) and the other rules and statutes cited allowed such appearances. They did and she did nothing improper in appearing before the court.

Discussion Regarding Count 1: At the legal conclusions for Count 1 the hearing officer found, AFFCLR, page 12, and the Board agreed that S. Ferguson acted improperly:

> In **appearing** ex parte during the pendency of mature and contested proceedings and failing to give notice to opposing counsel Respondent knowingly violated the due process requirements applicable to a Motion for Contempt, a Motion for a Writ of Restitution, and relief under CR 60(b) and CR 65(b).
>
> Respondent's assertion that the allowance in CR 65(b) that circumstances can exist where a temporary restraining order may be obtained without notice to the

> adverse party dispenses with the notice requirements attendant to contempt, procurement of a Writ of Restitution and relief from judgment or order is incorrect. By seeking an order of contempt, a Writ of Restitution and CR 60 remedied ex parte, Respondent knowingly violated former RPC 3.4(c) and 3.5(b) and 8.4(d).

[Emphasis added.] What this conclusion of law says is that S. Ferguson knowingly disobeyed an obligation under the rules of a tribunal, RPC 3.4(c); communicated ex parte with a judge when it was not permitted by law, RPC 3.5(b); and engaged in conduct prejudicial to the administration of justice, RPC 8.4(d), when she **appeared** ex parte without notice to the other side on her Motion for Contempt, Motion for a Writ of Restitution, and for relief under CR 60(b) and CR 65(b).

RPC 3.4(c) prohibits a violation of an obligation under the rules of a tribunal. In this case the allegation is that the obligation was to not appear ex parte without notice to the opposing party. Accordingly, if her appearance was not in violation of ex parte and notice rules, then she did not commit a violation of RPC 3.4(c). Such a violation turns upon whether there was a violation of RPC 3.5(b) - communication ex parte with a judge when it was not permitted by law. If her ex parte communication with the judge was permitted by law then she did not violate RPC 3.5(b) and, therefore, she did not violate an obligation under the rules of the tribunal under RPC 3.4(c).

The test for a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice) is found in *In re Curran*, 115 Wn.2d 747, 801 P.2d 962 (1990). Under the facts of this case, *Curran* provides that in order to prove a violation of RPC 8.4(d) the Association must show that a "practice norm" was not followed. In S. Ferguson's case the practice norm would be improperly appearing ex parte without notice to the opposing party on her Motion for Contempt, Motion for a Writ of Restitution, and for relief under CR 60(b) and CR 65(b). If the contact was permitted by the statutes and rules for the relief being sought, there would be no violation of a practice norm and, therefore, no violation of RPC 8.4(d). In short, if RPC 3.4(c) and 3.5(b) were not violated then RPC 8.4(d) would not be violated.

Therefore, it can be seen that in this case a finding of a violation of RPC 3.5(b) (ex parte communicate not permitted by law) is an antecedent to a finding of a violation of RPC 3.4(c) (violation of obligation to tribunal). A finding of a violation of either RPC 3.4(c) and/or RPC 3.5(b) are antecedents to finding a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice). In short, Count 1 turns on whether S. Ferguson violated RPC 3.5(b) by having ex parte contact with Judge Rickert which was not permitted by law.

A finding of a violation of RPC 3.5(b) turns on whether S. Ferguson's actions fell within the exception found in the rule which permits ex parte contact if "permitted by law." So we turn now to a discussion of whether she was permitted by law to have ex parte contact without notice for the various motions and relief she was seeking as identified by the hearing officer in his Conclusions of Law for Count 1.

The hearing officer concludes that her appearance without notice to the other side violates "the due process" requirements of CR 65(b).That is clearly wrong. CR 65(b) specifically provides that a TRO can be obtained without written or oral notice if certain requirements are met: a showing of irreparable harm and a certification of "the efforts, if any, which have been made to give notice to the opposing party." She specifically argued that there would be irreparable harm at page 13 of her motion. EX 33. She specifically put the court on notice that Owens had not been given notice. She did so both orally and in her pleadings.

We realize that one of the WSBA's big arguments is that she said she had not had time to notify Owens when five days had passed since she prepared the motion and declarations but that is irrelevant. The test is did she certify to the court her efforts to give notice which she did by telling the court she had not made any effort.

The Bar argues that she did not seek relief under CR 65(b) because she did not cite the rule by specific number in her motion or proposed order. It is correct that she did not but that is not the controlling issue. When she got to the courthouse on April 11, 2005, and was told that the judge was hearing ex parte motions and could argue hers if she wished, the question was "Had she met the requirements of a CR 65(b) motion?" and the answer was yes. CR 65(b) does not require a written motion and could be made orally on the spot so it makes no difference if her motion mentioned CR 65(b) by number.

CR 65(b) does require that she have an affidavit of specific facts making a showing of immediate and irreparable harm and a certification by the attorney of the efforts, if any, to give notice to other side. As discussed above she had filed such pleadings. Accordingly, when she was told that the judge would hear her motion she had met the written requirements for a CR 65(b) motion. Her motion which repeatedly discussed getting temporary and/or emergency injunctive relief or else her in person argument served as the vehicle for seeking relief under CR 65(b). The legal conclusion found at Count 1 that S. Ferguson could not appear ex parte before the judge without notice in regards to CR 65(b) is not correct.

The hearing officer concludes that her appearance without notice to the other side violates "the due process" requirements of CR 60(b). That too is clearly wrong. The notice requirements for a motion under CR 60(b) are set forth in CR 60(e). That subsection provides that first a motion and affidavit is filed which is then followed by obtaining an ex parte show cause order and that order is then served on the opposing party. The rule does not require notice of the filing of the motion and affidavit with an opportunity to argue against the issuing of the show cause order in the first place. CR 60(e). The legal conclusion found at Count 1 that S. Ferguson could not appear ex parte before the judge without notice in regards to CR 60(b) is not correct.

The hearing officer concludes that her appearance without notice to the other side violates "the due process" requirements for a Motion for a Writ of Restitution. That too is clearly wrong. It was Respondent's argument that the injunctive relief she sought was to get the Bransfords out of the house since their continued possession was leading to irreparable harm since the house was going to be foreclosed and that foreclosure could not be stopped unless the Fergusons could get possession of the house so they could convert their rental payments to mortgage payments. The only legal way to do that was to issue a writ and order of restitution. CR 65(b)

does not restrict what relief can be asked for in a TRO. Since she was permitted under CR 65(b) to have ex parte contact with the court without notice to Owens, she properly could ask for the relief she was seeking in the TRO. She may or may not have had a strong argument for this relief but that is not the issue; the issue is whether she was permitted by law to have ex parte contact with the court under CR 65(b), which she was, and, therefore, she properly had ex parte contact without notice to Owens when she asked for specific relief to be contained in the TRO.

The hearing officer concludes that her appearance without notice to the other side violates "the due process" requirements applicable to a Motion for Contempt. He is also wrong about this conclusion. It is ancient and unchanged law that one of the ways to bring an opposing party before the court for contempt is to file a motion and affidavit and to obtain an ex parte order to show cause why contempt should not be found. In *State v. Del Cary Smith*, 17 Wash. 430, 50 P. 52 (1897), Ella Smith sought a contempt order against her husband, Del Cary Smith, for failure to pay alimony ordered by the court. She did so by filing a motion and affidavit and, as is apparent from the case, obtained an ex parte order requiring Del Cary Smith to appear and show cause why he should not be held in contempt. Del Cary Smith sought to quash the show cause order on the

basis that it was issued without authority of law. The superior court granted the motion. On appeal the Supreme Court reversed and held that the process was proper and directed the case to proceed based on the affidavit and show cause order. S. Ferguson properly had ex parte contact with the court in order to obtain a show cause order regarding the contempt and the relief she was seeking pursuant to a finding of contempt.

The legal conclusions at Count 1 that S. Ferguson could not have ex parte contact with the court for the various motions she was seeking without notice to Owens is not correct. Both CR 60(e) and CR 65(b) recognize, anticipate and authorize such contact. Since CR 65(b) permits the contact in the first place it was not improper for her to argue for remedies under the TRO including a remedy in the form of a writ and order of restitution as being necessary in order to carry out the TRO remedy of permitting the Fergusons to obtain possession of the house. One of the ancient and approved methods for bringing a contempt proceeding is to file a motion and affidavit and to obtain an ex parte order of show cause to be served on the other party which is what S. Ferguson did. In all these instances S. Ferguson was permitted by law to have ex parte contact with the court under the specific exception provided in RPC 3.5(b).

S. Ferguson was permitted by law to have ex parte contact with the court without notice to the other side. She did not violate RPC 3.5(b), and therefore she did not RPC 3.4(c) since her contact was not a violation of an obligation under the rules of a tribunal. Since she did not violate either RPC 3.4(c) or RPC 3.5(b) she did not violate RPC 8.4(d) (conduct prejudicial to the administration of justice) since she did not violate any practice norms. Count 1 must be dismissed since as a matter of law she did not violate any of the RPC sections alleged against her.

It was up to the judge to weight the information and to decide if he wanted to grant the requested relief. The findings in Count 1 essentially seek to substitute the decision of the hearing officer for the decision of the judge as to what was allowed under the law. Respondent went before a judge and set forth the reasons she thought she was entitled to relief. The judge has a role to play as well. He had the documents and the order. It maybe that the Bar's position and the hearing officer's that an inadequate showing was made would be sustained if the case were subject to appeal but that is not the function of an attorney disciplinary proceeding. Respondent won her motion and now she is being punished by after the fact assertions of what should have been the ruling by the judge.

The Bar and the hearing officer apparently feel that since there was a chance to notify Owens between the time she finished her drafting and the surprise hearing on April 11 that she had to give that notice. That is not the law. The law of CR 65(b), on its face, allows both ex parte proceedings and proceedings without notice. The other matters found by the judge were issues before him and he signed the orders. Respondent anticipated that there would be a hearing on those issues but the judge signed the badly drafted order prepared for a different purpose. She was authorized to appear ex parte on the CR 65(b) motion, the judge then apparently jumped the gun and signed the order after having the pleadings before him and the order.

Count 1 cannot be sustained as a matter of law. The rules, statutes and court cases allow ex parte proceedings and provides that they can occur without notice.

Discussion Regarding Count 2: At the legal conclusions for Count 2 the hearing officer found, AFFCLR, page 12, and the Board agreed that S. Ferguson acted improperly:

> By misrepresenting the actions and representations of the opposing party to the Court during the course of an ex parte appearance, Respondent negligently violated former RPC 3.3(f).

RPC 3.3(f) provides that:

> In an ex parte proceeding, a lawyer shall inform the tribunal of all the relevant facts known to the lawyer that should be disclosed to permit the tribunal to make and informed decision, whether or not the facts are adverse.

The hearing officer found that S. Ferguson failed to inform the court of the "actions and representations of the opposing party." In order to find a violation he must also have determined that S. Ferguson knew of relevant actions of the Bransfords about which she did not inform the court. These supposed relevant actions are identified in AFFCLR ¶ 21.

AFFCLR ¶ 21 finds that Respondent made some false statements or misrepresentations to the court. It is possible to see this finding as implying that Respondent intentionally made false statement to the court. However, a statement may be inaccurate or factually wrong and in that sense be "false" or a "misrepresentation" without being an intentionally false statement or misrepresentation. Given the finding at AFFCLR ¶ 22 that the statements made in ¶ 21 were "the result of ignorance and overzealousness and the product of negligence" the hearing officer clearly found that Respondent did not make intentionally false statements or misrepresentations to the court.

As for the specific "false" statements she is alleged to have made: She did not make a "false" statement by negligence or otherwise to the effect that the Bransfords had no proof of mailing or payment at the March

30, 2005, hearing. There is a difference between statements of fact and statements made in the nature of argument. Respondent's statement in the motion to the effect that the Bransfords had no proof of mailing are in the nature of argument to the court. The Bransfords, through their attorney, offered to have Ms. Bransfords say she had mailed the checks. Respondent specifically provided the information in the Declaration of Andrew Ferguson that the Bransfords had represented to the court that they had made the payments, EX 37, ¶ 24. In her motion to the court Respondent referenced the court to the relevant paragraphs in Andrew Ferguson's Declaration. EX 33, page 6. Furthermore, the very next portion of the hearing officer's findings recognizes that Respondent herself referenced that the Bransfords had made representations to the court about allegedly making the payments.

Based on the fact the mortgage company was advising that payment had not been made, she now was arguing that the evidence showed that their representations were false and that they could not have had such proof since the payments had not in fact been made or received by the April 6, 2005. She had presented the differing versions of the facts to the judge and was arguing for her version. This portion of AFFCLR ¶ 21 should be rejected since the Bar failed to prove that the statement was not argument

and that S. Ferguson knew that the Bransfords had proof of the mailing of the payments.

Respondent denies that she made a "false" statement when she said that the Bransfords had falsely stated they had posted payments for February and March. Again this is an argument for her version of the facts after telling the court that the Bransfords had said they had made the payments but that the mortgage company was saying they had not. This portion of AFFCLR ¶ 21 should be rejected since the Bar has failed to prove that the statement was not argument and failed to show that S. Ferguson knew that in fact posted payments had been made. She did not know this since her sister had been told that very morning by the mortgage company that the payments were not current.

Respondent denies that she made a misleading statement to the court in making the statement that a vagrant or indigent person had moved into the house. This was a true statement. The person in the house had no permission to be there. His status as a vagrant or indigent person was not related to whether or not he was the son of the Bransfords. His status as the son of the Bransfords was not hidden from the court. His being the adult son of the Bransfords was specifically referenced along with the

"squatter" type conditions found in the house in Andrew Ferguson's Declaration. EX 37, ¶s 17, 18 and 31.

The hearing officer finds that because Respondent did not include the words that the squatter was the adult son of the Bransfords in the motion itself the statement that the person was a squatter was misleading. This is quibbling about how a lawyer argues her case. The court was on notice that the person in the house was the adult son of the Bransfords. When an adult person is living in squalid conditions in an apparently abandoned rental house it does not mean the person is not a squatter simply because he happens to be the adult son of the persons who have moved out. The Bar did not show that the son was not a squatter. In order for this to be a misleading statement they had to do so.

Respondent denies that she made a "false" statement regarding the Bransfords having not complied with the Court's order requiring payment of the February and March mortgage payments. Respondent told the judge the history of the matter and that the mortgage company was reporting that it had not received payments. Respondent cannot do more than that. Based on the facts as she knew them she argued what had happened. She told the court that the Bransfords claimed to have made the payments and that mortgage company said it did not have them. From this she argued her

position that the Bransfords had not complied with the court's order. This portion of AFFCLR ¶ 21 should be rejected since the Bar has failed to prove that the statement was not argument and that S. Ferguson knew otherwise.

The legal conclusions at Count 2 requires that S. Ferguson knew relevant facts which she did not disclose to the tribunal. RPC 3.3(f). Not only did the WSBA not show that misrepresentations occurred at all, the completely failed to show that S. Ferguson knew to the contrary. The hearing officer's finding at AFFCLR ¶ 22 that her failure to inform the court were "the result of ignorance and overzealousness" shows that S. Ferguson did not have the actual knowledge of different facts required to find a violation of RPC 3.3(f). Count 2 must be dismissed.

Discussion Regarding Count 3: At the legal conclusions for Count 3 the hearing officer found, AFFCLR, page 12, and the Board agreed, that S. Ferguson acted improperly:

> In failing to provide the court with the legal authority which requires notice to an adverse party prior to the issuance of an Order of Contempt and prior the issuance of a Writ of Restitution Respondent knowingly violated RPC 8.4(c) and 8.4(d).

RPC 8.4(c) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. RPC 8.4(d) prohibits the

lawyer from engaging in conduct prejudicial to the administration of justice. The contention at Count 3 is that when S. Ferguson obtained the Order of Temporary Injunctive Relief and To Show Cause Why Preliminary Injunction Should Not Issue her motion was required to specifically identify the notice and right to be heard requirements for a writ of restitution and for a contempt order. It is her failure to cite the notice requirements which are allegedly the misrepresentations for the RPC 8.4(c) violation and are the failure to follow the practice norms required for the RPC 8.4(d) violation. See, *supra* for discussion of *Curran* determination of what constitutes conduct prejudicial to the administration of justice. The hearing officer did not find that S. Ferguson acted intentionally.

Basically Count 3 finds that she failed to cite relevant law. This references in part the failure to include the second sentence regarding notice found in RCW 7.21.030(1). AFFCLR 10 and 11. There was no proof that she left out the second section for any improper purpose. She stated "I don't remember deciding to leave it out, if that's your question." RP 220. Every lawyer and judge in the world knows about notice requirements. Judge Rickert asked about notice during the hearing and she referenced the lack of notice to Owens in her declaration. It is ludicrous to think that the failure to cite the notice provision had any material impact on

the proceeding or that somehow Judge Rickert was hoodwinked into thinking that notice was not required.

This conclusion of law is also based in part on the determination that the confusing and contradictory proposed order signed by the judge was intended to and did actually find contempt but that was not the intent of the order. The intent was to obtain a show cause order for the contempt proceeding so that the notice and hearing requirements would be met. The motion itself contains in the caption that it is seeking to "shorten time for show cause hearing." EX 33, page 1. Since the motion was an attempt to obtain a show cause order so the notice and hearing requirement for contempt would be met, there would be no need to identify that such notice and hearing was required.

The conclusion of law at Count 3 is also based in part on an allegation of a failure to cite notice and hearing requirements relating to the obtaining of the writ of restitution. Neither the Bar nor the hearing officer identify what notice and hearing requirement they are referencing. The RCW 59.12.040, .070 and .080 complaint, summons and service requirements for an unlawful detainer action and writ of restitution against the Bransfords had already been met. AFFCLR ¶s 3 through 5. Thereafter, RCW 59.12.090 – Writ of Restitution - provides:

> The plaintiff at the time of commencing an action of forcible entry or detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue.

[Emphasis added.] The "at the time of commencing the action", which would be before the unlawful detainer action had been served, allowing the landlord to apply to the judge for a writ of restitution and the "or at any time afterwards," language does not require notice and an opportunity to be heard although the judge certainly could and usually does require it. Additional, here the writ of restitution was being sought as part of the relief on the CR 65(b) TRO which did not require notice and opportunity to be heard as long as the other requirements of CR 65(b) were met, as discussed above. Under these circumstances the service and notice requirements for an unlawful detainer action had already been met and they were referenced in the motion. Here the relief granted under the TRO motion had to be reviewed within 14 days as provided in CR 65(b). The WSBA failed to show what notice and hearing notice was not provided to the judge.

S. Ferguson did not act dishonestly or make a material misrepresentation in contravention of RPC 8.4(c). There is no proof that she was somehow trying to pull a fast one on the judge on such a basic concept as notice. If we were talking about some obscure interpretation of

the law, the failure to list a portion of a statute might be significant but in this instance we are talking about a fundamental right so basic that to suggest that somehow Judge Rickert was not or would not be aware of notice requirements is insulting to the judge and not credible. Because the rule is so basic and will known it is not contrary to the administration of justice not to have cited that portion of the statute.

The conclusion of law at Count 3 that S. Ferguson failed to provide necessary information to the court about notice and hearings for the contempt proceeding is incorrect since the motion sought a show cause hearing for such a hearing. The conclusion that S. Ferguson failed to provide the necessary information to the court regarding notice and hearing before the writ of restitution could issue as part of the relief in a TRO motion, where the unlawful detainer action had previously been filed and served and where the TRO would be subject to automatic review within 14 days, is also incorrect since the WSBA has failed to show that in such circumstances such notice and opportunity to be heard on the writ of restitution was in fact a requirement before the TRO could issue. Count 3 must be dismissed.

Discussion Regarding Other Specific Findings: Respondent disputes the following findings. She realizes that the test is:

> An attorney challenging findings of fact must present argument as to why the specific findings are unsupported and cite to the record to support that argument. The attorney must do more than argue his or her version of the facts while ignoring the testimony of other witnesses. *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005).

Her disputes with the below findings of fact are based on the lack of any evidence or substantial evidence in the record to support them.

AFFCLR ¶ 6 – Respondent disputes the finding that she had an opinion that the Fergusons' legal and financial position would be significantly enhanced if the Fergusons came into possession before the bankruptcy was filed. She was aware that the homestead exemption existed and that to take advantage of it the Fergusons probably needed to be back in the house but that did not mean she had the opinion that the Fergusons' financial position would be significantly enhanced. TR 510. There was no proof that Respondent had this opinion. The reason they needed to be back in the house was so they could start to make payments on it. This was the reason for the motion. TR 512-513 and 551 – 552.

AFFCLR ¶ 19 – Respondent disputes the finding that the statement in her declaration about not having time to provide notice was false. In her declaration, EX 35, she stated that she did not have time to provide notice but significantly she also stated at paragraphs 5 and 6 that she needed to scan the motion so her clients could seek the noting of the

hearing and that "I intend to take steps to ensure that Mr. Owens receives notice of the hearing as soon as possible by having my clients deliver a copy of the motion, as soon as possible." She anticipated that the court would provide a hearing date and that Owens would be advised of the hearing date and motion at that time. When she went to the Skagit County Courthouse the clerk told her to go right in so in fact at that point she did not have time to give notice to Owens. She made no secret that she had not given him notice. The declarations were dated and what the state of affairs was when she signed it.

The Bar and hearing officer contend that because there was five days between the time the pleadings were drafted and the hearing that it was false that she had not had time to notify Owens. That is not correct since what she expected to be giving to Owens was the date to come to court to argue all the motions. When the court surprised her by taking up the case immediately she in fact did not have time to advise Owens. She could have refused to bring the matter up at that point but she believed that as long as she spelled out what had happened in her pleadings that the emergency relief provisions of CR 65(b) permitted the judge to exercise his discretion on whether to sign the order. As such he could properly consider the motion. She had the right to go before the judge and she told him she

had not notified Owens, which was correct. It was also correct because of how the matter came up that she had not had time. The judge was fully able to see the dates on the pleadings. Additionally, there is no evidence that the judge even considered that portion of the pleadings. He may have relied upon his prior knowledge of the case and his knowing that he had ordered the mortgage to be paid. Under such circumstances he may have felt no that notice was not necessary no matter how much time had passed since the pleadings were prepared.

There was no proof in the record that from the time S. Ferguson learned from the clerk that she could immediately present her motion on the ex parte calendar to the time she appeared shortly thereafter that there was time for her to give notice to Owens. Her statement was literally correct given the status of the matter at the time she went before Judge Rickert.

AFFCLR ¶ 20 – Respondent contests the finding the Respondent was aware that Judge Rickert did not review all the pleadings. There is no substantial evidence to support this finding. There were only four persons who could testify about that issue and one was Judge Rickert, who did not testify. Another was the sister-in-law, Julianne Ferguson, who was present at the hearing. She stated that the hearing seemed pretty quick to her and

that the judge looked at the papers "flipping" through them. TR 475. Andrew Ferguson was present and he remembered Respondent handing papers to the judge and the judge asking questions about whether the mortgage had been paid. TR 450 – 453. It but it does not appear that the Respondent testified at all on the issue other than to say that she thought that before she went to the courtroom on that date the clerk took the papers to the judge ahead of time. RP 546 – 547.

That is all the evidence there is on this issue. There is no substantial evidence in the record to support the finding that Respondent knew the judge had not reviewed the paperwork but even if she did it would be irrelevant. It is not up to the lawyer to make a judge do his or her job correctly. If a judge is not comfortable with the time he or she has to review something he or she can take it under advisement. Respondent put her arguments into pleadings, stating the facts and law as best she knew, and then argued for relief. The judge granted it. It was up to the judge to determine what he needed to do and the time he needed to take to feel he could do his job, not Respondent.

AFFCLR ¶ 22 – This finding addresses Respondent's state of mind in regards to the statements identified in AFFCLR 21. Respondent does not contest that if there was a problem with the identified matters that it was

the result of negligence but for the reasons set forth in the AFFCLR 21 discussion above, she contests that there were misrepresentations or false statements at all. If the court adopts her argument as to AFFCLR 21, then AFFCLR 22 should be reversed since it relies upon AFFCLR 21 as its basis.

AFFCLR ¶ 25 – Respondent contests the finding that she failed to make the showing required by CR 65(b). *See* discussion above.

AFFCLR ¶ 26 – This finding specifically deals with Respondent's failure to provide notice to Owens of her intent to appear and seek emergency relief. Respondent contests that her failure to provide notice to Owens was a conscious and knowing violation of statue, court rule, and professional obligation. There is no substantial evidence to support this finding. The uncontroverted evidence from her brother, sister-in-law and Respondent was that the plan was to get a hearing date and then give the notice to Owens. Respondent had no idea that when she went to the courthouse to get the date that she would be told she could go have her hearing immediately. There is simply no dispute about that. She did not plan to have the matter heard without notice to Owens, she even had her young daughter in tow. Additionally, CR 65(b) allowed her to get an order with no notice at all if she made the necessary showing. The judge found

she did. She cannot be found to have consciously and knowingly failed to give notice when the rule permits relief with no notice at all.

AFFCLR ¶ 27 – Respondent contests that her actions caused harm to the Bransfords. There is no proof that they had more legal expense then they would have had if the matter had gone to the trial in Skagit County. The Fergusons were going into bankruptcy in any case. When they did the house was going into the bankruptcy. The only question was whether or not the Fergusons would be able to claim a homestead exemption. Accorindingly, there was no delay caused by the order obtained by Respondent. Finally, the hearing officer finds that the Bransfords were harmed by the finding of contempt entered against them. There is no proof in the record of any such harm.

Aggravators and Mitigators

Aggravators: The hearing officer found the aggravator of refusal to acknowledge the wrongful nature of her conduct. ABA Std. §9.22 (g). AFFCLR ¶ 28. The Court should reject this determination. This essentially punishes Respondent for contesting the allegations against her. *In re Discipline of Carmick*, 146 Wn.2d 582, 605, 48 P.3d 311 (2005).

The hearing officer found the aggravator of substantial experience in the practice of law. ABA Std. §9.22 (i). AFFCLR ¶ 29. While it is correct Respondent does have substantial experience in the practice of law she does not have experience in emergency relief. RP 499. The Bar put on no contrary proof. Accordingly it should be rejected as an aggravator to be applied to the issues in this case or at the most given little or no weight.

Mitigators: The hearing officer found the mitigator of absence of prior disciplinary record. ABA Std. §9.32 (a). AFFCLR ¶ 30. The Court should also find the additional mitigators of absence of dishonest or selfish motive and inexperience in the practice of law. ABA Stds. §9.32 (b) and (f). The evidence was that Respondent took on the case to help her brother. RP 501, 512. She also had no experience in filing emergency motions so the mitigator of inexperience should be applied as that is the relevant consideration as it applies to the issues in this case.

Discussion Regarding Sanctions: Because the hearing officer found that Respondent had knowingly engaged in misconduct he found that the presumptive sanction for suspension applied as to Counts 1 and 3. However, Respondent did not engage in knowing misconduct and in fact she engaged in no misconduct at all. He also found that because she acted

negligently in regard to Count 2, a reprimand was appropriate. As discussed above this determination is not well founded.

All the Respondent did in this matter was try to help her brother. She did not set out to have an ex parte proceeding without notice but had prepared pleadings which allowed such a proceeding when she was told the court was sitting on its ex parte calendar. When she went to get a hearing date so notice could be provided to the opposing attorney the court took her motion immediately under consideration. She understood the law to permit ex parte consideration and to allow it to occur without notice. It was up to the judge to make the determination of whether the tests required by the rule were met. He determined that they were. She is now being faulted for making a successful legal argument. That is not the purpose of attorney disciplinary proceedings. She did nothing wrong and the case against her should be dismissed.

[Continued on next page for signature only.]

Dated this 9th day of October, 2009.

/s/

Kurt M. Bulmer, WSBA # 5559
Attorney for Respondent Ferguson

OFFICE RECEPTIONIST, CLERK

To: Kurt Bulmer
Subject: RE: Sandra Ferguson - SC # 200,719-8

Rec. 10-9-09

From: Kurt Bulmer [mailto:kbulmer@comcast.net]
Sent: Friday, October 09, 2009 12:45 PM
To: OFFICE RECEPTIONIST, CLERK; Craig Bray
Subject: Sandra Ferguson - SC # 200,719-8

Attached hereto is Respondent Sandra Ferguson's Opening Brief in SC # 200,719-8, Bar # 27472.

I will mail and original signed declaration of service later today.

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